

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIETRICH L. EARL,

Defendant-Appellant.

UNPUBLISHED

October 28, 2003

No. 241595

Wayne Circuit Court

LC No. 01-008600

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions of possession with intent to deliver a controlled substance, MCL 333.7401(2)(a)(iii), carrying a concealed weapon, MCL 750.227(2), possession of a firearm by a felon, MCL 750.224f, and felony firearm, MCL 750.227b. We affirm.

Defendant first contends that the prosecution failed to present sufficient evidence to establish his guilt for carrying a concealed weapon beyond a reasonable doubt. We disagree. To determine if sufficient evidence existed for a conviction in a criminal proceeding, the court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Underlying issues of statutory interpretation are reviewed de novo. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

In *People v Gatt*, 77 Mich App 310; 258 NW2d 212 (1977), this Court noted that the carrying a concealed weapon statute contained internal exceptions. “The clear meaning of the statute is that the carrying a concealed weapon statute does *not* apply where the unlicensed handgun is carried in the carrier’s dwelling house, place of business or on other land possessed by him, regardless of the use to which the premises are put.” *Id.* at 312 (emphasis original). The burden of establishing these exceptions rests on the defendant. *Id.* at 311, citing *People v Clark*, 21 Mich App 712; 176 NW2d 427 (1970). A defendant must offer evidence that the location where he carried the concealed weapon qualified for one of the exceptions. See *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). Defendant failed to meet this burden.

Defendant offered no evidence that an exception to the statute applied. In fact, defendant conceded his guilt on this charge. Defendant testified that he had the gun in the pickup for over a month, and he readily admitted that he had been driving the truck around with the weapon concealed in a hidden dash compartment. Further, defense counsel plainly conceded the issue in closing argument. Given that defendant conceded the issue and offered no evidence to show that an exception to the carrying a concealed weapon statute applied, he does not qualify for the exception. See *id.* “The prosecution need not disprove statutory exceptions unless advanced by defendant.” *People v Carey*, 36 Mich App 640, 641; 194 NW2d 93 (1971). Thus, the prosecution need not prove that defendant did not qualify for the exceptions to the statute in order for defendant’s conviction to stand. See *id.* Further, defendant conceded his guilt on this issue and may not harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Conceding his guilt constituted a waiver and extinguished any error. See *id.* at 216.

Next, defendant claims his trial counsel’s failure to move for a directed verdict on the carrying a concealed weapon charge constituted ineffective assistance of counsel. We disagree. Because defendant did not preserve this claim below, our review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995). As noted above, the record evidence was sufficient to convict defendant of carrying a concealed weapon. Defendant admitted before trial began that the gun in the pickup was his gun. Given the admission, the lower court would have denied a motion for directed verdict. A defendant is not denied effective assistance by counsel refusing to make a meritless motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant argues that there was only sufficient evidence to convict him after he testified. Assuming arguendo that this is true, defendant still was not denied the effective assistance of counsel. There is a strong presumption that a counsel’s tactics constitute sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). We will not substitute our judgment for that of the defense counsel’s when it comes to trial strategy, even if that strategy backfires. *Id.* Defense counsel pursued a consistent strategy throughout the trial – to argue that defendant was telling the truth in denying ownership of the drugs found during a police raid of his home by showing that defendant admitted to carrying the gun found contemporaneously with the drugs. Counsel obviously attempted to lessen the impact of the admission while at the same time decrease the chance that the jury would convict defendant of the drug crime, which carried a stiffer penalty. Although this strategy failed, we will not use hindsight to second-guess it. See *id.* Further, defendant does not challenge the fundamental fairness of the proceedings, nor is there evidence in the lower court record to suggest that the proceedings and results of the trial were fundamentally unfair. See *People v Pickens*, 446 Mich 298, 312 n 12; 521 NW2d 797 (1994). Therefore, defendant was not denied the effective assistance of counsel. See *id.*

Next, defendant argues that the prosecution committed several acts of misconduct during his trial. We disagree. Defendant did not object to any of the alleged prosecutorial misconduct, therefore, review is for a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are reviewed by this Court case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

The first instance of prosecutorial misconduct claimed by defendant stems from the prosecution questioning him regarding the truthfulness of other witnesses. The prosecution asked defendant if the testifying police officers were lying. A prosecutor may not ask a defendant to comment on the credibility of the prosecution's witnesses. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, reversal is not warranted if the prejudicial effect of the error could have been cured by a cautionary instruction. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000). Here, the prosecution's questioning of defendant does not warrant reversal because, had defendant objected, the trial court could have given a proper curative instruction. See *Buckley, supra* at 18. Further, defendant handled the questions well and the trial court instructed the jury on judging the credibility of witnesses. Under the circumstances, any error resulting from the questions is harmless. See *People v Loyer*, 169 Mich App 105, 116-118; 425 NW2d 714 (1988).

Defendant also claims that the prosecution committed misconduct by disparaging defense counsel, placing the prestige of the prosecutor's office behind defendant's guilt, and inflaming the jury's sympathy and sense of civic duty during closing arguments. Prosecutors should not appeal to the fear and prejudice of a jury through a civic duty argument, nor should they express personal opinions on the defendant's guilt. *Bahoda, supra* at 282-283. Appeals to the sympathy of the jury constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But a prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case. *Bahoda, supra* at 282.

Here, the prosecution responded to a defense theory. A prosecutor's comments are considered in light of the defendant's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Throughout the trial, defense counsel vigorously questioned the truthfulness of the testifying police officers. In closing argument, defense counsel insinuated that the police and judicial system were corrupt. His argument implied that the police arrested innocent persons, that the court treated them as guilty until proven innocent, and that the police and prosecutor in this case conspired to warp the evidence. The prosecution rebutted these statements by arguing that the police officers had little reason to lie and that it angered him that the police would so often be accused of lying when they risked their lives every day in the war on drugs. The prosecutor argued that he and the police did not conspire to frame defendant but were seeking the truth in this case while defense counsel only attempted to get his client off. Taken in context, the prosecution's statements counter the defense theory. Once an issue is raised, the door is open to a full, not just a selective, development. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Further, reversal based upon an unpreserved claim of prosecutorial misconduct is only warranted where a curative instruction could not have alleviated the prejudicial effect. *Schutte, supra*. A trial court's careful and explicit instructions to a jury that it is required to decide the case only on the evidence and that the lawyer's arguments are not evidence cures any prosecutorial misconduct in closing arguments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The trial court gave such instructions; thus, defendant is not entitled to relief.

Finally, defendant alleges that the prosecutor improperly argued facts not in evidence by referring to the police witnesses' lack of incentive to lie. However, the remarks were in response to the defense's general theory that the police officers were corrupt and lying on the stand. The prosecution responded by arguing that the police have little motivation to lie because they

receive no rewards for defendant's conviction. Taken in context, this argument is a valid response to a defense theory. See *Allen, supra*. Further, any error was cured by appropriate jury instructions. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot